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No. 99-16

Supreme Court, U.S.
FILED
JUL 28 1999
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1998

RAMONA S. BURNETTE,

Petitioner,

vs.

SIGNET/FIRST UNION NATIONAL BANK and CAPITAL ONE BANK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals correctly held that Ms. Burnette's claims of bankruptcy discrimination were time-barred, as they were brought more than one (1) year after the alleged discriminatory acts occurred?

2. Whether 11 U.S.C. § 525(b) applies where no employer-employee relationship exists?

STATEMENT PURSUANT TO RULE 29.6

Respondent First Union National Bank[1] is a national banking association headquartered in Charlotte, North Carolina. Its parent corporation is First Union Corporation, which is also headquartered in Charlotte, North Carolina. First Union National Bank has no non-wholly owned subsidaries.

[1] Since March 1994, Signet Bank and Capital One have been separate and distinct entities with no affiliation. On or about November 29, 1997, Signet Bank merged with and into First Union National Bank ("First Union"). As a result, Signet Bank is proceeding in this appeal as First Union. To avoid possible confusion, First Union National Bank will continue to be referred to as "Signet" throughout this Brief.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

OPINONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Introduction 1
B. Proceedings in the Courts Below 3

REASONS FOR DENYING THE WRIT 3

I. THERE IS NO CONFLICT AMONG THE CIRCUTS CONCERNING THE APPLICABLE LIMITATIONS PERIOD 4

II. 11 U.S.C. § 525(b) IS INAPPLICABLE AS NO EMPLOYMENT RELATIONSHIP EXISTED BETWEEN PETITIONER AND RESPONDENT 6

III. PETITIONER RAISES NO NEW ISSUES FROM HER PREVIOUS APPEAL 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

Alession v. Adkins, 102 B.R. 485 (E.D. Va. 1989) 9, 10

Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966) 5

Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheetmetal, Inc., 221 Va. 81, 266 S.E.2d 887 (1980) 6

Fiorani v. CACI, 192 B.R. 401 (E.D. Va. 1996) 3, 7, 8

Garrett v. Phillips Mills, 721 F.2d 979 (4th Cir. 1983) 9

In re Hardy, 209 B.R. 371 (E.D. Va. 1997) 3, 8

Kinder v. Coleman & Yates Coal Co., 974 F.Supp. 868 (W.D. Va. 1997) 5

Madison Madison Int'l, P.C. v. Matra (In re Madison Madison Int'l, P.C.), 77 B.R. 678 (E.D. Wis. 1987) 7

Michael v. Sentara Health System,
939 F. Supp. 1220 (E.D. Va. 1996)..... 5

North Star Steel Co. v. Thomas, 515 U.S. 29,
132 L.Ed.2d 27, 115 S.Ct. 1927 (1995)..... 5

Pastore v. Medford Sav. Bank,
186 B.R. 553 (D. Mass. 1995)..... 8

Purcell v. Tidewater Construction Corp.,
250 Va. 93, 458 S.E.2d 291 (1995)..... 6

Purcell v. Tidewater Constr. Corp.,
34 Va. Cir. 91 (1994), aff'd 250 Va. 93,
458 S.E.2d 291 (1995)..... 6

Reed v. United Trans. Union, 488 U.S. 319,
102 L.Ed.2d 665, 109 S.Ct. 621 (1989)..... 5

Spirides v. Reinhardt, 613 F.2d 826
(D.C. Cir. 1979)..... 8, 9

Statutory Provisions:

11 U.S.C. § 525(b)..... *passim*

28 U.S.C. § 1658..... 1, 4

Va. Code § 8.01-248..... 6

OPINIONS BELOW

The opinion and order of the District Court (Civil Action Number 3:97CV865; Pet. App. 9-16) was filed on July 20, 1998 and is unreported. The opinion of the Court of Appeals (No. 98-2242; Pet. App. 1-2) was entered on February 3, 1999 and is unpublished. A petition for rehearing and rehearing *en banc* was denied on March 15, 1999 (Pet. App. 21). On June 18, 1999, the Chief Justice extended the time to petition for a writ of *certiorari* to June 28, 1999.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are 28 U.S.C. § 1658 and 11 U.S.C. § 525(b).[1]

STATEMENT OF THE CASE

A. Introduction

On November 17, 1997 and June 16, 1998, Ramona S. Burnette ("Petitioner" or "Burnette") filed complaints in

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[1] In her petition, Burnette cites numerous constitutional provisions and amendments, as well as 28 U.S.C. §§ 1331, 1334 and 42 U.S.C. § 1983. None of these constitutional or statutory provisions are at issue here.

the United States District Court for the Eastern District of Virginia, Richmond Division ("District Court") against Signet/Capital One Bank. In the first complaint, Burnette alleged that Signet failed to hire her in violation of 11 U.S.C. § 525(b). In her second complaint, Burnette alleged that a "temporary position" she was working at Signet (through an employment agency) was terminated when she "probably was identified by the Human Resources Department" as a "previous applicant."

Finding "substantial similarities" in Burnette's two complaints, the District Court consolidated them by orders of July 8, 1998 (Pet. App. 18-19). By Final Order of July 20, 1998, the District Court granted Capital One Bank's Motion to Dismiss[2] pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("F.R.C.P.") (Pet. App. 9-16).

Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the ruling of the District Court on February 3, 1999 (Pet. App. 1-2). A petition for rehearing and rehearing *en banc* was denied on March 15, 1999 (Pet.

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[2] Signet filed a motion to dismiss based on F.R.C.P. 12(b)(6) on July 20, 1998. At that time, counsel for Signet was unaware of Burnette's November 17, 1997 complaint and the District Court's consolidation orders of July 9, 1998. By order of July 22, 1998, the District Court dismissed Signet's motion as moot, in light of the Court "having resolved the matters presented therein." Nevertheless, both grounds for dismissal cited in this Brief in Opposition were raised previously by Signet in its initial motion to dismiss and were relied upon by the District Court in its decision dismissing Burnette's claims.

App. 21). The petition for a writ of *certiorari* was docketed on June 28, 1999.

B. Proceedings in the Courts Below

In his opinion dismissing the Petitioner's claims, Judge James R. Spencer held that (1) 11 U.S.C. § 525(b) did not apply to Burnette or "the facts of this case" and (2) Burnette's claims were barred by the applicable statute of limitations. Specifically, the District Court cited In re Hardy, 209 B.R. 371 (E.D. Va. 1997), wherein "the Bankruptcy Court examined the legislative history of [11 U.S.C. § 525(b)] and found that the correct reading requires the debtor be an employee of the employer-defendant." Moreover, the District Court noted that "[p]reviously, this Court articulated the same principle. See Fiorani v. C.ACI, 192 B.R. 401, 408 (E.D. Va. 1996) (dismissing claim for discrimination in hiring because it did not allege termination of employment or discrimination with respect to employment under 11 U.S.C. § 525(b))." (Pet. App. 13).

In a per curium opinion, the Fourth Circuit Court of Appeals affirmed the decision of the District Court (Pet. App. 1-2).

REASONS FOR DENYING THE WRIT

There is no split in authority among the circuits with respect to the applicable limitations period for Burnette to have brought her claims. Consonant with the other decisions considering the question, the court of appeals

correctly affirmed the District Court's holding that, since 11 U.S.C. § 525(b) contains no express limitations period and was enacted prior to December 1, 1990, a court will look to closely analogous state statutes for the applicable limitations period (Pet. App. 15). There is simply no "compelling reason" for *certiorari* under this Court's criteria as set forth in Rule 10.

In addition, the District Court correctly held that, even if Burnette's claims were timely, she nevertheless failed to allege sufficient facts to establish the requisite employment relationship between herself and the respondent. Consequently, 11 U.S.C. § 525(b) does not apply here. [3]

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICABLE LIMITATIONS PERIOD

11 U.S C. § 525(b), which was enacted prior to December 1, 1990,[4] contains no express limitations period. "In the absence of an explicit limitations period in a federal statute, courts presume that Congress intended by its silence to borrow a limitations period from the most

[3] While the Fourth Circuit Court of Appeals, in its per curium decision, appears to have affirmed the District Court's dismissal of Burnette's claims based only on timeliness, this second ground for dismissal was argued in Respondent's Motion to Dismiss and was relied upon by the District Court in its decision to dismiss Petitioner's claims.

[4] Pursuant to 28 U.S.C. § 1658, federal statutes enacted after December 1, 1990 that do not contain an express statute of limitations have a four-year limitations period.

analogous state law cause of action." Kinder v. Coleman & Yates Coal Co., 974 F.Supp. 868, 872 (W.D.Va. 1997) (citing Reed v. United Trans. Union, 488 U.S. 319, 323-24, 102 L.Ed.2d 665, 109 S.Ct. 621 (1989); see also, North Star Steel Co. v. Thomas, 515 U.S. 29, 33-34, 132 L.Ed.2d 27, 115 S.Ct. 1927 (1995)). In North Star Steel, Justice Souter noted that "[a] look at his Court's docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims." North Star Steel v. Thomas, 515 U.S. at 33 (internal citations omitted). In short, "[s]ince 1830, 'state statutes have repeatedly supplied the periods of limitations for federal causes of actions' when the federal legislation makes no provision." Id. at 34 (quoting Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703-704, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966)).[5]

In Virginia, there is no state law equivalent to 11 U.S.C. § 525(b). However, Virginia law does recognize the tort of wrongful discharge, which is generally subject to the present two-year "catch-all" limitations period of Va. Code § 8.01-248. See, e.g. Michael v. Sentara Health System, 939 F.Supp. 1220 (E.D. Va. 1996) (one year

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[5] A "closely circumscribed" and "narrow" exception to the general rule exists when the state limitations period would "frustrate or interfere with the implementation of national policies" or would be "at odds with the purpose or operation of federal substantive law." North Star Steel v. Thomas, 515 U.S. at 34 (internal citation omitted). However, petitioner does not argue, nor does the record suggest that Virginia's limitations period somehow "stymie[s] the policies underlying the federal cause of action." Id.

statute of limitations applies to wrongful discharge claims);[6] Purcell v. Tidewater Construction Corp., 250 Va. 93, 458 S.E.2d 291 (1995) (applying "catch-all" limitations period to state law wrongful discharge claims).

"Under Virginia law, a cause of action accrues on the date that the party has a right to bring the asserted action." Purcell v. Tidewater Constr. Corp., 34 Va. Cir. 91, 92 (1994), aff'd 250 Va. 93, 458 S.E.2d 291 (1995) (citing Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheetmetal, Inc., 221 Va. 81, 266 S.E.2d 887 (1980)). Insofar as Burnette alleges that she was denied employment in 1993 and 1994, her claims fall under the earlier version of the "catch-all" statute. As a result, the District Court was correct in dismissing both of her complaints as time-barred, because neither was filed within one year after the accrual of her alleged causes of action.

II. 11 U.S.C. § 525(b) IS INAPPLICABLE AS NO EMPLOYMENT RELATIONSHIP EXISTED BETWEEN PETITIONER AND RESPONDENT

The District Court correctly held that, even if Burnette's claims were timely, she nevertheless has failed to allege sufficient facts to establish the requisite employment relationship between herself and the respondent. Consequently, 11 U.S.C. § 525(b) does not apply.

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[6] Causes of action arising prior to July 1, 1995 are subject to the one-year limitations period. Va. Code § 8.01-248 (1992).

11 U. S.C. § 525(b) states in pertinent part:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title [or] a debtor under the Bankruptcy Act ... solely because such debtor or bankrupt ... is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act.

While this language clearly covers terminations, alleged discrimination in hiring is not encompassed in the statute. Fiorani v. CACI, supra, is on point. In Fiorani, the Court held that 11 U.S.C. § 525(b) does not apply to hiring decisions for several reasons. First, the Court noted that the statutory language makes no reference to hiring, and to read the phrase "discriminate with respect to employment" to include hiring decisions:

> seems to stretch the statute too far, for if the reference to discrimination "with respect to employment" is read to cover hiring, it would for the same reasons, seem that the phrase was also meant to reach termination. But it is quite apparent that this is not so, given the statute's framers found it necessary to make separate, explicit reference to termination.

Fiorani, 192 B.R. at 405 (E.D. Va. 1996); see also Madison Madison Int'l, P.C. v. Matra (In re Madison Madison Int'l, P.C.), 77 B.R. 678 (E.D. Wis. 1987).

Second, the Court found an even "more compelling clue" when it compared 11 U.S.C. § 525(b) to § 525(a), which was enacted some six years earlier. "Subsection (a), which applies only to governmental units, states that a governmental unit may not '*deny employment to,* terminate the employment of, or discriminate with respect to employment against" a debtor or bankrupt." Id. (emphasis original). Consequently, while section (a) specifically includes hiring in the statutory language, section (b) does not. "This is compelling evidence that § 525(b) does not reach hiring, for it is well-established that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposefully in the disparate inclusion or exclusion." Id. (internal citations omitted). See also In re Hardy, 209 Bankr. 371 (E.D. Va. 1996); Pastore v. Medford Sav. Bank, 186 Bankr. 553 (D. Mass. 1995).

In her complaint of June 16, 1998, Burnette appears to claim that she was an employee of Signet by virtue of her relationship with Kelly Services, a temporary employment agency. However, she failed to plead any facts by which the District Court could have concluded that she somehow was "controlled" by Signet. Such "control" remains the primary factor for determining whether an employer-employee relationship exists. Fiorani, 192 Bankr. at 409. Nevertheless, Burnette also failed to allege facts that would have allowed the District Court to determine whether she met the other relevant Spirides factors, such as the kind of occupation in question, the skill required to perform such occupation, whether the "employer" or the individual furnished the

equipment used and the place of work, the length of time the individual had worked, and so on. Id. (*citing* Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979)).

Finding, that Burnette had failed to plead facts by which it could consider even "the most basic of the Spirides factors, namely, Signet/Capital One's right to control the means and manner of her work performance," the District Court properly dismissed Burnette's complaints. See also Garrett v. Phillips Mills, 721 F.2d 979 (4th Cir. 1983) (adopting the factors listed in Spirides).

III. PETITIONER RAISES NO NEW ISSUES FROM HER PREVIOUS APPEAL

In her petition, Burnette does little to demonstrate that the court of appeals erred in affirming the decision of the District Court. Regarding the limitation issue, the Petitioner states that "FEDERAL COURTS DO NOT ADOPT STATE STATUTES OF LIMITATIONS IN CASES INVOLVING FEDERAL QUESTION." (Pet. App. 13, 16) (emphasis original). The lone cite provided by the Petitioner in support of this assertion is Alession v. Adkins, 102 B.R. 485 (E.D. Va. 1989).

The Alession case does not help the Petitioner. First, it is not on point, as it does not involve 11 U.S.C . § 525(b). Second, Alession does not hold that a federal court will not apply a state statute of limitations. Quite the contrary, the court in Alession specifically looked to Virginia's statute of limitations regarding the enforcement of written contracts to determine whether the plaintiff's

collection efforts were timely. Id. at 488. Put simply, the Alession case does not stand for the proposition advanced by the Burnette.

As for the second issue, the Petitioner fails to cite any authority to support her argument that 11 U.S.C. § 525(b) applies in the absence of an employer-employee relationship.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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